SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 431

TESSIM ZORACH AND ESTA GLUCK,
Appellants,

vs.

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE AND JAMES MARSHALL, CONSTITUTING THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL.

PPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

KENNETH W. GREENAWALT,
Counsel for Appellants.

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COURT OF APPEALS STATE OF NEW YORK

In the Matter of the Application of TESSIM ZORACH and ESTA GLUCK, Petitioners-Appellants, for an Order Pursuant to Article 78 of the Civil Practice Act,

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE, and JAMES MARSHALL, Constituting the Board of Education of the City of New York and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York, Respondents, Directing Them to Discontinue Certain School Practices, and THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS, Intervenor-Respondent.

JURISDICTIONAL STATEMENT

May It Please the Court:

In support of the jurisdiction of the Supreme Court of the United States to review the above-entitled cause on appeal and in compliance with Rule 12 of the Rules of that Court, Petitioners-Appellants respectfully represent:

Opinions Below

The opinion of the Court of Appeals of the State of New York in this cause (including concurring and dissenting opinions), filed July 11, 1951, is reported in 303

N. Y. 161; 100 N. E. (2d) 463, and a copy thereof is appended hereto as Exhibit "A".

The opinion of the Appellate Division of the Supreme Court, State of New York, Second Department (including dissenting opinion), filed January 15, 1951, is reported in 278 App. Div. 573; 103 N.Y.S. (2d) 27; and a copy thereof is appended hereto as Exhibit "B".

The opinion of Special Term, Supreme Court, State of New York, Kings County, filed June 19, 1950, is reported in 198 Misc. 631; 99 N.Y.S. (2d) 339, and a copy thereof is appended hereto as Exhibit "C".

The opinion of said Special Term, on its denial of petitioners' motion for reargument, filed on or about August 22, 1950, is reported unofficially in 124 N. Y. Law Journal, issue of August 23, 1950, col. 5, p. 299, and a copy thereof is appended hereto as Exhibit "D".

Dates of Judgment and of Appeal

The judgment and order of the Court of Appeals affirming the order appealed of the Appellate Division of the Supreme Court, Second Department, as well as the opinion of the Court of Appeals, were filed on July 11, 1951. Also, on that date the remittitur of the Court of Appeals was issued to the Supreme Court, State of New York, Kings County. An order on remittitur was filed in the Supreme Court, State of New York, Kings County, on July 30, 1951, by which the order and judgment of the Court of Appeals was made the order and judgment of that Court and the order of the Appellate Division of the Supreme Court, Second Department, was affirmed.

The application for appeal to the United States Supreme Court was presented to the Chief Judge of the Court of Appeals of the State of New York on September 19th, 1951.

Statutory Provision Sustaining Jurisdiction

The appeal is within the jurisdiction of the United States Supreme Court under Title 28 U.S. Code, § 1257 (2), which provides that a final judgment or decree rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court of the United States as follows:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

This proceeding, brought under Article 78 of the New York Civil Practice Act, and the judgment appealed from of the Court of Appeals of New York draws in question, under the Constitution and laws of the United States, the validity of the act of the New York State Legislature in enacting Section 3210 (1) b of the Education Law of the State of New York and the rules and regulations of respondent Commissioner of Education of the State of New York and of respondent Board of Education of the City of New York established and promulgated on the authority and pursuant to such statute and the operation in the public schools of New York City of a "released time" program under the authority of such statute and such rules and regulations.

The statute expressly authorizes and sanctions said rules and regulations of respondents and the operation by respondent Board of Education of said released time program in New York City public schools and has been so construed herein by the Court of Appeals of New York.

The following decisions, among others, sustain the jurisdiction of the United States Supreme Court to review the judgment of the Court of Appeals of direct appeal in this

cause: *McCollum* v. *Board of Education*, 333 U.S. 203, 206 (1948); *Niemotko* v. *Maryland*, 95 U.S. Sup. Ct. (Law Ed.) 237, 238 (1951); *Williams* v. *New York*, 337 U.S. 241, 243 (1949); *Railway Express* v. *New York*, 336 U.S. 106, 108 (1949).

State Statute the Validity of Which Is Involved

This cause or proceeding involves the validity of a state statute (§ 3210 (1) b of the Education Law of the State of New York; Laws of 1940, Ch. 305; McKinney's Consolidated Laws of New York, Book 16, Part 1, Art. 65, Part I, p. 761); the validity of the rules and regulations of the Commissioner of Education of the State of New York established pursuant to and on the authority and in implementation of said statute (Regulations of Commissioner of Education, Art. 17, § 154; 1 N. Y. Official Compilation of Codes, Rules and Regulations at p. 683); the validity of the rules and regulations of the Board of Education of the City of New York established pursuant to and on the authority and in implementation of said statute and said rules and regulations of the Commissioner of Education; and the validity of the "released time" program actually operated in the New York City public schools under the authority of said statute and said rules and regulations and by act of the respondent Board of Education in cooperation with a local religious council (the intervenor herein) and other religious organizations.

Section 3210 of the Education Law of New York, which is part of the "Compulsory Education" law, provides in part as follows:

"§ 3210. *Amount and character of required attendance.*

1. Regularity and conduct. (a) A minor required by the provisions of part one of this article to attend

upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending. (b) *Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.*" (italics supplied)

The italicized subdivision, here in question, was added to the law as an amendment by the Laws of New York, 1940, Ch. 305.

The said rules and regulations established by the State Commissioner of Education on July 4, 1940, which are still in force and effect, are as follows:

"1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

The said rules and regulations established by the Board of Education of the City of New York on November 13, 1940, are as follows:

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

"2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

"3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week, except that in classes on a departmental schedule release will be limited to the last period of the program.

"5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

"6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

The latter rules and regulations have continued in full force and effect without change, except Rule No. 4 which was amended by said Board of Education on September 4, 1941, to read as follows:

> "4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough."

The operation of the "released time" program in the New York City public schools by act of said Board of Education in cooperation with a religious council (the intervenor) and other religious organizations is described in the petitioners' petition herein and, also, in the answers and accompanying papers of respondents and intervenor.

The program is set up and operated by respondent, Board of Education, under such statute, rules and regulations. The intervenor, Coordinating Committee, or particular religious organizations distribute, either to parents of public school children at home or in churches or to public school children at or near the public school premises, cards entitled "Registration for Released Time Religious Instruction", to indicate the parent's desire and approval of his child's being released from public school for sectarian religious instruction during school hours at a place outside of the school building and grounds and to specify the particular religious center to which the child is to go. Such registration cards are delivered by the children to the principal and are retained and filed in the office of the local public school. The public school authorities in turn deliver lists of the children, whose parents so consent, to the Coordinating Committee or other religious organizations or to the religious centers at which the instruction is to be given.

The Board of Education sets up and prescribes a schedule for released time instruction for a certain hour of a certain day each week for each of the five boroughs of the City of New York.

The children whose parents have signed such cards are released regularly for one hour each week from attendance at the public school classes on condition that they attend, during the "released" hour, at the religious center for sectarian religious instruction. The parents who sign such consent cards thus enter into an understanding with the public school authorities that their children will attend and receive sectarian religious instruction at the religious centers in consideration of their children being released from attending at regular public school classes.

Children whose parents do not sign such consent cards are separated from the other children and are required to continue in attendance at the public schools in pursuance of secular work or studies. The children who are released receive sectarian religious teaching in the faith of the center which they attend. At weekly intervals the religious centers file with the local public school authorities and the Coordinating Committee lists of the children who have been released from public schools but have not reported for religious instruction at the religious centers, which reports of attendance contain a statement of the reasons for any absence from such courses by the pupils.

The released time program in New York City is under the supervision of said intervenor Coordinating Committee, which committee was formed to promote religious instruction through the use of the public school system and cooperates closely with the public school authorities in the planning, promotion and management of such program. The program is operated by respondent Board of Education.

Statement of the Nature of the Case

This proceeding was brought by petitioners pursuant to Article 78 of the New York Civil Practice Act, which relates to proceedings against a body or officer and to proceedings formerly known in New York as certiorari to review, mandamus and prohibition.

This proceeding is in the nature of a mandamus. It challenges the constitutionality of the "released time" program operated in the New York public schools and the state statute and the rules and regulations of the respondents authorizing and establishing such released time program. The bases of this challenge are the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in the case of *McCollum* v. *Board of Education*, 333 U.S. 203.

This proceeding was started in July, 1948, but, because of a collateral attack by respondent Commissioner of Education on the jurisdiction of the Supreme Court, Kings County, pursued through the highest appellate court of New York, a hearing on the merits of the petition and proceedings was long delayed. In due course respondents served their respective answers to the petition, which were supplemented by affidavits and contained an objection in point of law. The intervenor, also, served an answer containing affirmative defenses to which petitioners served a reply.

Each of petitioners is a United States citizen, resident, taxpayer and property owner in Kings County, New York, and the parent of a child or children who attend public schools in the City of New York in the Borough of Brooklyn, County of Kings, in which the "released time" program in question is in operation. None of the children of the petitioners participates in the released time program but all regularly attend Protestant Episcopal and Jewish schools,

respectively, for religious instruction at times other than the hours in which public schools are in session. When other pupils in these schools were released to attend classes of religious instruction outside of the schools, they were required to continue their secular studies and work in the public schools.

In petitioners' petition are alleged the released time statute (Sec. 3210 (1) b of the Education Law) and the rules and regulations of each of the respondents (the text of which appears above). As alleged in said petition, respondent Commissioner of Education is the chief executive officer of the New York State system of education, is charged with enforcement of laws relating to the educational system of the State, the execution of state educational policies and the general supervision of all schools subject to the provisions of the Education Law. Respondent Board of Education has immediate supervision and control of the public school system of the City of New York. The released time program in New York City is under the general supervision of an organization known and referred to herein as the "Coordinating Committee" (the intervenor), which closely cooperates with the public school authorities in the planning, management and operation of the released time program.

The petition alleges the manner in which said released time program is actually operated in the New York City schools. This is described above. Concededly and stated generally, by such program pupils attending public schools for secular studies under the New York compulsory education law are released, during public school hours by the school authorities and on written request of parents and a duly constituted religious body prepared to initiate such program of religious instruction, from attendance at the public schools and upon the secular studies thereof for one hour each week in order to attend courses in religious in-

struction in their faiths, held at religious centers outside of school property. Pupils whose parents do not request their attendance upon such religious courses or whose religious sect has not set up a program for religious instruction in cooperation with the regimen of the public school are kept in school to pursue their secular studies and work. The registration cards for such religious courses and reports of attendance or absence of pupils at such religious courses are filed with the local public school authorities.

As alleged in the petition, each respondent, upon petitioners' demand, refused to rescind their respective rules and regulations and to discontinue the released time plan in operation. Also, as alleged in the petition, the administration of the released time system necessarily entails the use of the public school machinery and time of public school employees; the operation of the compulsory public school education system in New York assists and is integrated with such program of sectarian religious instruction and pupils compelled by law to go to school for secular instruction are released in part from their legal duty on the condition that they attend religious classes; the system results necessarily in the exercise of pressure and coercion on parents and children to secure attendance by the children for religious instruction; is a utilization of the state's tax-established and tax-supported public school system to aid religious groups to spread their faith; and results inevitably in divisiveness among the public school children because of the differences in beliefs or disbeliefs.

Petitioners contend, that not only the state statute and the rules and regulations of the respondents but, also, the released time program as actually operated—either as set forth in allegations of the petition or as admitted by the pleadings as a whole—violate the First and Fourteenth Amendments of the United States Constitution.

Questions Presented

The questions presented by this appeal are set forth with particularity in the Assignment of Errors which accompanies the petition for appeal. Briefly summarized, these questions are as follows:

1. Whether Section 3210 (1) b of the Education Law of New York and the rules and regulations authorized and established pursuant thereto by the respondents are in violation of the First and Fourteenth Amendments of the United States Constitution as constituting laws respecting an establishment of religion and prohibiting the free exercise thereof?

2. Whether the operation of the "released time" program in the public schools of New York City—either as such operation is described in petitioners' petition herein or as such operation is admitted by all of the pleadings herein—violates the First and Fourteenth Amendments of the United States Constitution and the interdiction therein against laws respecting an establishment of religion and prohibiting the free exercise thereof?

3. Whether the New York system of released time, as authorized and established by Section 3210 (1) b of the Education Law and by the rules and regulations of each of the respondents and as actually operated and practiced in the public schools of New York City, violates the First and Fourteenth Amendments of the United States Constitution and the principles set forth by the United States Supreme Court in *McCollum* v. *Board of Education*, 333 U.S. 203?

4. Whether petitioners' petition herein states facts sufficient to constitute a cause of action and whether petitioners are entitled, on the pleadings and on the merits, to an order as prayed for in their petition, under the provisions of the First and Fourteenth Amendments of the United States

Constitution and the decision of the United States Supreme Court in *McCollum v. Board of Education*, 333 U.S. 203?

5. Whether the limiting of participation in the New York system of released time to "duly constituted religious bodies" is in violation of the First and Fourteenth Amendments of the United States Constitution?

Manner, Method and Time of Raising Federal Questions Sought to Be Reviewed

This proceeding was initiated in the Supreme Court, New York, Kings County, under the provisions of said Article 78, by petitioners serving and filing their petition and notice of application (Papers on Appeal, pp. 11-23).

The Federal questions sought to be reviewed on this appeal were raised by petitioners at every stage of the proceeding, in all the state courts having jurisdiction.

Such Federal questions were first raised by and in the petition, wherein, it was alleged by petitioners in Paragraphs Seventeenth, Eighteenth, Nineteenth and Twentieth (Papers on Appeal, pp. 21-22) that the state statute (Sec. 3210 (1) b of the Education Law), the rules and regulations established by respondents pursuant thereto and the operation of the released time program in the public schools of New York City violated the First and Fourteenth Amendments of the United States Constitution and the prohibitions therein against laws respecting an establishment of religion and prohibiting the free exercise of religion. Also, in Paragraphs Twelfth, Thirteenth, Fourteenth and Fifteenth of said petition, petitioners alleged specific elements and features present in the operation of such program that brought it in conflict with the law of the United States, as set forth by the United States Supreme Court in *McCollum v. Board of Education*, 333 U.S. 203.

In its opinion the Court at Special Term of Supreme Court, Kings County, New York, stated that "The question

validly presented by this proceeding is solely addressed to the constitutionality of the statute and regulations"; that it had reached a determination adversely to petitioners on the paramount legal question in the case, namely, the constitutionality of the statutes and regulations; and that the "released time" program, the statute and regulations were not unconstitutional (Papers on Appeal, fols. 290, 266-7, 285-6, 288, 293-4).

The Court at Special Term further held that "the present 'released time' program contains none of the objectionable features of the plan in that case (ie. the *McCollum* case) which was the basis of the decision in the Supreme Court of the United States holding the plan to be unconstitutional"; and that the "subsequent decision of the courts in this state in Matter of Lewis v. Spaulding (supra) is clearly determinative of the constitutionality of the plan under attack" (Papers on Appeal, fols. 285-90). That Court further stated it found that "assuming all of the facts set forth in the petition are deemed to be true", nothing appeared to warrant a finding that the statute and regulations adopted by the respondents were unconstitutional. That Court referred to and quoted from the concurring and dissenting opinions of the United States Supreme Court in the *McCollum* case, but failed to mention the opinion of the Court therein written by Mr. Justice Black.

Such Federal questions were raised and discussed at length in the oral arguments and briefs of the parties at Special Term.

On petitioners' motion for reargument, which was denied, the Court at Special Term stated:

> "This is a motion for a reargument of a motion heretofore decided by this Court which sought to have declared unconstitutional the 'released time' program for religious instruction now in effect in the public elementary schools of this city."

Then, after referring to the *McCollum* case and to the cases of *Matter of Lewis* v. *Spaulding*, 193 Misc. 66, appeal withdrawn, 299 N.Y. 564, and *People ex rel. Lewis* v. *Graves*, 245 N.Y. 195, Special Term continued:

> "This court must reaffirm its determination of constitutionality on the basis of the above decisions and hold to its distinction between the New York and the Champaign plans."

Such Federal questions were next raised in the oral argument and printed briefs of the parties in the Appellate Division and were passed on by that Court in both the majority and dissenting opinions. The majority opinion stated:

> "Petitioners contended, for reasons set forth in their petition, that the regulations so established and the operation thereunder of the 'released time program' in New York City, pursuant thereto, prohibited the free exercise of religion in violation of the First and Fourteenth Amendments of the United States Constitution, and Section 3, Article 1 of the Constitution of the State of New York, and that Section 3210 of the Education Law, if construed to authorize the establishment of such regulations and the operation of the released time program thereunder as described in their petition, was also unconstitutional as violative of the First and Fourteenth Amendments of the United States Constitution."

The majority opinion stated that "Subdivision 1b of Section 3210 of the Education Law, * * * is in no way unconstitutional" and that no constitutional rights of the petitioners were invaded by the adoption of the regulations complained of or the operation thereunder of the released time program.

The minority opinion pointed out that there was no substantial difference, constitutionally, between the New York

City program and the Champaign, Illinois program and that the New York City program is void because it possesses the factors which this Court held to be constitutionally critical in the *McCollum* case. (See Papers on Appeal, fols. 327-332.)

Such Federal questions were next raised in the Court of Appeals in the oral argument and printed briefs of the parties and were passed on by that Court in the majority, concurring and dissenting opinions.

In the majority opinion, the Court stated:

> "This appeal challenges the constitutionality of the long-standing 'released time' program in New York City, whereby parents may withdraw their children from the public schools one hour a week to receive religious instruction in the faith of their acceptance.
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> * * * * * * *
>
> "Appellants * * * challenge by this article 78 proceeding the constitutionality of the foregoing statute and rules *in toto*, upon the ground that they violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Federal Constitution, as applied to the States by the Fourteenth Amendment, and prohibit the free exercise of religion in violation of the First and Fourteenth Amendments of the Federal Constitution and Section 3 of Article 1 of our State Constitution.
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> * * * * * * *
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> "Under the circumstances, whether the released time program is constitutional is solely a question of law, and the case has been so treated by Special Term as well as by the Appellate Division majority and dissenters."

The concurring opinion by Judge Desmond stated:

> "This is a mandamus proceeding (Civ. Prac. Act, Art. 78) brought to compel the New York City Board

of Education and the State Commissioner of Education, to discontinue and abolish the so-called 'released time program' in the city's public schools, on the alleged ground that the release of children from those schools, for one hour a week, at the request of parents, to attend outside religious instruction in their several faiths, violates the Federal Constitution as to its First Amendment, made applicable to the States by the Fourteenth Amendment. Specifically, it is the contention of petitioners that the program as conducted in New York City, and the State statute and State and local regulations under which it operates, 'are violative of the U. S. Constitution within the principles set forth in the *McCollum* decision' that is, *Illinois ex rel. McCollum* v. *Board of Educ.* (333 U. S. 203). I vote for affirmance, because I see no basis for any claim of unconstitutionality."

The dissenting opinion stated:

"Petitioners challenge that program as a breach of the wall of separation which the First Amendment erected.

. . . . . .

"In its present posture, the case before us poses the simple question whether the program just described is infected with the same constitutional infirmity that the United States Supreme Court found in *McCollum*. And, though it is ultimately upon the meaning of the First Amendment that the answer to that question depends, we are no longer free since the *McCollum* decision to place our own meaning or gloss upon that Amendment, but must read it as has the Supreme Court.

. . . . . .

"In the words of Mr. Justice Black, 'This is not separation of Church and State' (*supra*, 333 U. S., p. 212). This is more than a 'friendly gesture'—the phrase is Judge Froessel's—between church and State; obvi-

ously it is not the separation demanded by the Constitution.

"Time has taught, and the Supreme Court, by its decision in *McCollum* has reaffirmed, the wisdom and necessity of maintaining 'a wall * * * high and impregnable' between Church and state, between public school secular education and religious observance and teaching. * * * Whether the released time program in New York City breaches that barrier is the only issue before us. I believe that it does.

* * * * * * *

"However, as I have already indicated, I believe—as did two of the Justices in the Appellate Division—that, on the basis of statute, regulations and the admitted allegations of the petition, petitioners are entitled to a decision, on the pleadings, that the released time program under consideration falls within the ban of the Federal Constitution.

"Accordingly, I would reverse and direct entry of a final order granting the relief sought in the petition."

All of the opinions mentioned above discussed the decision of the United States Supreme Court in *McCollum* v. *Board of Education*, 333 U. S. 203.

Manifestly, the rulings of all of the Courts of the State of New York were of a nature to bring this cause within the statutory provision stated above to confer jurisdiction on the United States Supreme Court.

The Questions Involved Are Substantial

The appeal in this case presents to the Supreme Court of the United States the important question of the constitutionality, under the First and Fourteenth Amendments of the United States Constitution and the decision in *McCollum* v. *Board of Education*, 333 U. S. 203, of the New York system or program of "released time", as authorized

and established by State statute and respondents' rules and regulations and as operated in the public schools of New York City.

This New York system of released time was placed before that Court in the *McCollum* case in an *amicus curiae* brief filed on behalf of Protestant Council of City of New York by the attorney for the intervenor in this proceeding, and was referred to in detail in the dissenting opinion of Mr. Justice Reed in that case at pages 250-51, footnotes 20, 21, 22.

It seemed manifest that the United States Supreme Court, in the *McCollum* case, had clearly indicated that released time systems, and certainly released time systems of the Champaign, Illinois and New York types, violated the American tradition of separation of Church and State as set forth in the First and Fourteenth Amendments, and had held, as Mr. Justice Reed stated in his dissenting opinion, that "Under it (i.e. that Court's judgment) • • • children cannot be released or dismissed from school to attend classes in religion while other children must remain to pursue secular education. Teachers cannot keep the records as to which pupils are to be dismissed and which retained. To do so is said to be an 'aid' in establishing religion; the use of public money for religion".

That seemed even plainer when, in giving effect to that decision, the Circuit Court of Champaign issued its final order for mandamus in which the local Board of Education was ordered "To prohibit within said original School District Number 71 the use of the state's public school machinery to help enroll pupils in the several religious classes of sectarian groups", and when, thereafter, said Board of Education discontinued religious instruction during public school hours and substituted therefor a program of religious instruction during after school hours.

That action seemed especially significant since the Illinois Courts, in deciding the *McCollum* case, had relied upon an earlier case entitled *"People ex rel. Latimer* v. *Board of Education,* 394 Ill. 228 (which had involved a system of released time exactly like New York's and in which the Illinois Supreme Court had cited and relied upon the early New York case of *People ex rel. Lewis* v. *Board of Education,* 245 N. Y. 195). In its decision in the *McCollum* case, 396 Ill. 14, the Illinois Supreme Court held that the program involved in the *Latimer* case was to all intents and purposes exactly like that involved in the *McCollum* case, except that the classes were held outside of the classrooms. In other words, so far as the Illinois Courts were concerned, there was no essential difference, constitutionally, between the New York type of released time and the Champaign type of released time; and the reversal of their decision in the *McCollum* case was, also, an indication that the United States Supreme Court regarded the two types of programs as essentially similar, constitutionally.

Subsequent to the decision of the United States Supreme Court in the *McCollum* case, a system of released time in operation in St. Louis similar to that in operation in New York City was invalidated, as unconstitutional on the basis of the *McCollum* decision, by the St. Louis Circuit Court. (See *Balaza* v. *Board of Education of St. Louis,* #18369, Div. No. 3, May 25, 1948 per Koerner, J.—not officially reported.) Also, in *Milwaukee County* v. *Carter,* 258 Wisc. 139; 45 N. W. (2) 90 (Dec. 1950), the Supreme Court of Wisconsin recently approved the broad principle of the *McCollum* case that the use of public school time and of the agency of the compulsory education law for religious instruction is unconstitutional.

Nevertheless, in New York respondent Commissioner of Education and respondent Board of Education both refused

to comply with the written demands made by each of the petitioners on June 27, 1948 (on the basis of the *McCollum* decision and the constitutional provisions) to rescind their rules and regulations establishing the released time program and to discontinue the operation of that program in the New York City public schools and said respondents have since persisted in such refusal.

Upon such refusal by respondents, petitioners instituted this proceeding against them in July, 1948. A hearing and decision on the merits of their proceeding and petition was delayed because of a prolonged and unsuccessful attack by the Commissioner of Education on the jurisdiction of the Supreme Court, Kings County (see 86 N.Y.S. (2d) 17; aff'd. 275 App. Div. 774; aff'd. 300 N.Y. 613).

Respondents have now been upheld in their refusals by the New York State Courts, but not without strong dissents in the Appellate Division and the Court of Appeals. While this proceeding was being delayed on the jurisdictional point, a decision was rendered by the Supreme Court, Albany County, New York, in *Matter of People ex rel. Lewis v. Spaulding*, 193 Misc. 66 (1948), appeal withdrawn 299 N.Y. 564, in which it was held that the New York system of released time as set forth in said statute and regulations—without reference to any facts regarding the actual operation of such released time program in the public schools—was not unconstitutional.

The attitude of the New York State and City educational authorities and the New York Courts appears to petitioners to be wholly unjustified in light of the *McCollum* case, but it has created the urgent necessity of having the issues in this cause reviewed by the United States Supreme Court.

Released time systems essentially similar to that authorized and operated in New York are still in operation in other localities and states in various parts of the country. Only a decision of the United States Supreme Court will

clarify the confusion and resolve the judicial conflict which now exists in the States on the subject of the validity and constitutionality of such a released time system, as a result of the New York Court decision.

It appears from a news article headed "Sees 'Released Time' Renewal" (published in The Christian Century of September 12, 1951, page 1056) that, according to Dr. Edwin L. Shaver of a national religious education council, most of the released time programs which were discontinued after the United States Supreme Court's decision in the *McCollum* case will now be resumed as a result of the decision of the Court of Appeals herein. Such acts would substantially nullify the decision in the *McCollum* case. (The Dr. Shaver referred to is identified in the *McCollum* decision at pages 228, 252, as a leading proponent of and a writer on released time.)

It is of utmost importance that the questions raised in this cause be decided by the United States Supreme Court finally and at an early date.

These questions are of great interest to the public, public school children and their parents, public school educators, governmental authorities and religious organizations, not only in New York State but throughout the nation.

For all of the reasons mentioned above, it is respectfully submitted that the Federal questions presented are substantial and that petitioners' appeal in this cause to the United States Supreme Court should be allowed.

Respectfully submitted,

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EXHIBIT "A"

OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK (303 N. Y. 161; July 11, 1951)

COURT OF APPEALS

In the Matter of the Application of TESSIM ZORACH and ESTA GLUCK, *Petitioners-Appellants*,

for an order pursuant to Article 78 of the Civil Practice Act,

against

ANDREW O. CLAUSON, JR., ET AL., constituting the Board of Education of the City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York, *Respondents*,

directing them to discontinue certain school practices,

and

THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS, *Intervenor-Respondent*.

Appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 15, 1951, which, by a dividend court, affirmed an order of the Supreme Court at Special Term (Di Giovanna, J.; opinion 198 Misc. 631), entered in Kings County in a proceeding under article 78 of the Civil Practice Act (1) denying a motion by petitioners for an order directing a trial in respect to asserted issues of fact, (2) granting a cross motion of the intervener-respondent for an order directing a dismissal of the proceeding on the merits, (3) sustaining objections of respondents to the petition, and (4) denying petitioners' application and dismissing the petition on the merits.

FROESSEL, J.:

This appeal challenges the constitutionality of the long standing "released time" program in New York City,

whereby parents may withdraw their children from the public schools one hour a week to receive religious instruction in the faith of their acceptance.

For many years released time existed in this State without express statutory authority. Then in 1940 the State Legislature, by an almost unanimous vote and with the approval of Governor Lehman (1940 Papers of Governor Lehman, p. 328), added (L. 1940, ch. 305) to the Education Law, which governs, among other things, the attendance of minors in public schools, the following provision:

> "Absence for religious observance and education shall be permitted under rules that the commissioner (of education) shall establish."

Pursuant to this provision, which is now found in subdivision 1-b of section 3210 of the Education Law, the State Commissioner of Education has promulgated the following rules (Regulations of the Comr. of Education, Art. 17, § 154; State of N. Y. Official Compilation of Codes, Rules and Regulations, Vol. 1, p. 683):

> "1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.
>
> 2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.
>
> 3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.
>
> 4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.
>
> 5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.
>
> 6. In the event that more than one school for religious observance and education is maintained in any

district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Additional rules have been established by the New York City Board of Education:

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week except that in classes on a departmental schedule release will be limited to the last period of the program.

5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Appellants, parents of children attending public schools in New York City who do not avail themselves of this program and are in nowise obliged to do so, challenge by this Article 78 proceeding the constitutionality of the foregoing statute and rules *in toto*, upon the ground that they violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Federal Constitution, as applied to the states by the Fourteenth Amendment, and prohibit the free exercise of religion in violation of the First and Fourteenth Amendments of the Federal Constitution and Section 3 of Article I of our State Constitution. The courts below have denied them relief and dismissed the proceeding.

In support of their contention, appellants rely primarily on *McCollum* v. *Board of Education*, 333 U. S. 203. There, a local board of education in Champaign County, Illinois, participated in a released time program which differed radically from the one before us. There was no underlying state enabling act. Religious training took place in the school buildings and on school property. The place for instruction was designated by the school authorities. Pupils taking religious instruction were segregated by school authorities according to faiths. School officials supervised and approved the religious teachers. Pupils were solicited in school buildings for religious instruction. Registration cards were distributed by the school, and in one case printed by the school. None of these factors is present in the case before us, and, accordingly, the Supreme Court's holding that the Champaign released time program was constitutionally invalid is not controlling here.

In the New York City program there is neither supervision nor approval of religious teachers and no solicitation of pupils or distribution of cards. The religious instruction must be outside the school building and grounds. There must be no announcement of any kind in the public schools relative to the program and no comment by any principal

or teacher on the attendance or nonattendance of any pupil upon religious instruction. All that the school does besides excusing the pupil is to keep a record—which is not available for any other purpose—in order to see that the excuses are not taken advantage of and the school deceived, which is, of course, the same procedure the school would take in respect of absence for any other reason.

It is manifest that the *McCollum* case is not a holding that all released time programs are *per se* unconstitutional. The Supreme Court's decision is limited to the fact situation before it. Thus, Mr. Justice Black, writing for the Court, reviewed the evidence so far as undisputed and stated (p. 209) that the "foregoing *facts*" (emphasis supplied)

> "show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education."

In the instant case, there is no "use" of tax-supported "property or credit or any public money" "directly or indirectly" "in aid or maintenance" of religious instruction (*People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, mot. for rearg. den. 245 N. Y. 620, affg. 219 App. Div. 233, affg. 127 Misc. 135), and there is no such cooperation as in the *McCollum* case between the school authorities and the religious committee in promoting religious education.

Other justices who wrote in the *McCollum* case were even more explicit in placing boundaries on the determination. Mr. Justice Frankfurter, in a concurring opinion in which three other justices joined, stated:

> "Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication" (p. 225).
>
> "The substantial difference among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does 'released time' operate in Champaign" (p. 226)?
>
> "We do not consider, as indeed we could not, school programs not before us which, though colloquially

> characterized as 'released time', present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable" (p. 231).

Mr. Justice Jackson, in addition to agreeing with the limitations expressed by Mr. Justice Frankfurter, added reservations of his own, and stated:

> "we should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain" (p. 232),

and that

> "it is important that we circumscribe our decision with some care" (p. 234).

Mr. Justice Reed, who dissented from the Court's holding, pointed out (pp. 239-240) that expressions in the opinions of his colleagues

> "seem to leave open for further litigation variations from the Champaign plan."

Thus, in addition to the reference in the Court's opinion to the "foregoing facts" of the Champaign plan as showing its unconstitutionality, we have five other justices expressly agreeing that released time as such is not unconstitutional.

Binding precedent must therefore be found in our own decision of nearly twenty-five years ago in *People ex rel. Lewis* v. *Graves, supra*, which involved a released time program in the City of White Plains. Such program, except for the absence of a state enabling act, was substantially the same as the one now in issue. Judge Pound, writing for a unanimous court, its other distinguished members having been Chief Judge Cardozo, and Judges Crane, Andrews, Lehman, Kellogg and O'Brien, there said (p. 198):

> "A child otherwise regular in attendance may be excused for a portion of the entire time during which

the schools are in session, to the extent at least of half an hour in each week to take outside instruction in music or dancing without violating the provisions of the Compulsory Education Law, either in letter or spirit. Otherwise the word 'regularly' as used in the statute would be superfluous. Practical administration of the public schools calls for some elasticity in this regard and vests some discretion in the school authorities. Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. * * *

The separation of the public school system from religious denominational instruction is thus complete. Jealous secretaries may view with alarm the introduction in the schools of religious teaching which to the unobservant eye is but faintly tinted with denominationalism. Eternal vigilance is the price of constitutional rights. But it is impossible to say, as matter of law, that the slightest infringement of constitutional right or abuse of statutory requirement has been shown in this case."

To like effect are *Gordon* v. *Board of Education of the City of Los Angeles*, 78 Cal. App. 2d 464, rev. den. 78 Cal. App. 2d 464, and *Matter of Lewis* v. *Spaulding*, 193 Misc. 66, app. withdrawn 299 N. Y. 564.

Two years before our decision in the *Lewis* case, it had been "assumed" by the Supreme Court that freedom of speech and of the press, likewise guaranteed by the First Amendment, were protected by the due process clause of the Fourteenth Amendment (*Gitlow* v. *New York*, 268 U. S. 652, 656), and, while the appellant in the *Lewis* case laid greater stress on Article IX, section 4 (now Art. XI, § 4) of the New York Constitution, he expressly urged in his petition the "violation of the constitutional guarantees of the New York State and the United States Constitution respecting religious liberty and the separation of church and state." Nevertheless we held that the released time program did not breach the so-called "wall of separation" between church and state.

No metaphorical "wall" that mere words can build ever precisely and mathematically delineates a constitutional right. The Supreme Court has recognized, in a religious freedom case, that to "make accommodations between these freedoms" guaranteed by the First Amendment and "an exercise of state authority" is always "delicate" (*Prince* v. *Commonwealth*, 321 U. S. 158, 165). Such freedoms are not absolute (*Prince* v. *Commonwealth*, *supra*, at p. 166; *Dennis* v. *United States*, — U. S. —; *Breard* v. *Alexandria*, — U. S. —, decided June 4, 1951; *Schenck* v. *United States*, 249 U.S. 47). Numerous situations involving some incidental benefit to religion have been found constitutionally unexceptionable (see, e. g., *Everson* v. *Board of Education*, 330 U. S. 1; *Cochran* v. *Louisiana State Board*, 281 U. S. 370; *Bradfield* v. *Roberts*, 175 U. S. 291). Tax exemption of church properties (Tax Law, § 4 (6)) is but another of many illustrations, and the practice is universally followed. Very recently, in upholding the Sunday Law, we have recognized that separation of church and state does not mean that every state action remotely connected with religion must be outlawed (*People* v. *Friedman*, 302 N. Y. 75, app. dismd. for want of a substantial Federal Question, 341 U. S. 907).

It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and state shall be discountenanced. The so-called "wall of separation" may be built so high and so broad as to impair both state and church, as we have come to know them. Indeed, we should convert this "wall", which in our "religious nation" (*Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 470) is designed as a reasonable line of demarcation between friends, into an "iron curtain" between enemies, were we to strike down this sincere and most scrupulous effort of our State Legislators, the elected representatives of the People, to find an accommodation between constitutional prohibitions and the right of parental control over children. In so doing we should manifest "a governmental hostility to religion" which would be "at war with our national tradition" (*McCollum* v. *Board of Education*,

supra, at p. 211) and would disregard the basic tenet of constitutional law that

> "* * * the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution" (*Atkin* v. *Kansas*, 191 U. S. 207, 223) must, of course, be exercised

to protect the constitutional rights of these appellants, it must also be remembered that the First Amendment not only forbids laws "respecting an establishment of religion" but also laws "prohibiting the free exercise thereof". We must not destroy one in an effort to preserve the other. We cannot, therefore, be unmindful of the constitutional rights of those many parents in our State (we are told that some 200,000 children are enrolled in the released time programs in this jurisdiction, and ten times as many throughout the nation) who participate in and subscribe to such programs. The right of parents to direct the rearing and education of their children, free from any general power of the State to standardize children by forcing them to accept instruction from public school teachers only, is an unquestioned one (*Pierce* v. *Society of Sisters*, 268 U. S. 510), and, more recently, the nation's highest tribunal has declared:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder" (*Prince* v. *Commonwealth*, *supra*, at p. 166).

Because the public school must be kept separate and apart from the church, pupils may not constitutionally receive religious instruction therein. All that New York parents ask then is that their children may be excused one hour a week for that purpose. The New York City Board of Education provides more days for secular instruction than required by law (Education Law, § 3204 (4)). The education Law does not fix the number of hours that constitute a

school day. Excuses from attendance are permitted for many good reasons; among others, children are excused from school on holy days set apart by their respective faiths, thus producing a most obvious form of divisiveness, not parallelled in the released time program. Indeed we are all agreed that refusal to excuse children for that reason would be an unconstitutional abridgement of freedom of religion. If it be constitutional to excuse children of a particular faith for entire days for such a religious purpose, it seems clear, by a parity of reasoning, that it is equally constitutional, under the circumstances here presented, to excuse children of whatever faith one hour a week for another and similar religious purpose.

Moreover, parents have the right to educate their children elsewhere than in the public schools, provided the State's minimum requirements are met (Education Law, § 3204; *Pierce* v. *Society of Sisters*, *supra*), and thus, if they wish, choose a religious or parochial school where religious instruction is freely given. That being so, it follows that parents, who desire to have their children educated in the public schools but to withdraw them therefrom for the limited period of only one hour a week in order to receive religious instruction, may ask the public school for such permission, and the school may constitutionally accede to this parental request. There is nothing in the Constitution commanding that religious instruction may be given on the Sabbath alone, and on no other day.

Appellants assert that in any event triable issues of fact are presented. A basic difficulty with this contention is that appellants now declare that they are prepared to show on a trial matters that have not even been properly pleaded. A great many of their allegations are conclusory in character (*Kalmanash* v. *Smith*, 291 N. Y. 142, 154), and, as appellants concede, have been lifted bodily from portions of the *McCollum* opinions, without the statement of adequate facts to support them (Civ. Prac. Act, § 1288). As the Appellate Division said, "* * * if the truth of all of the *well-pleaded* allegations of the petition is conceded, petitioners have failed to allege *facts* sufficient to establish any invasion of

their constitutional rights * * * " (emphasis supplied; 278 App. Div. 573, 575).

Moreover, many of the conclusory allegations show merely a disobedience of the rules and regulations. Such disobedience, while it might warrant the initiation of disciplinary proceedings against any of the offending teachers or principals, would in nowise warrant the relief prayed for, namely, a total discontinuance of the released time program and a rescission of all regulations established by the authorities. It is, of course, possible that a statute and regulations constitutional on their face may be administered in an unconstitutional way (*Snowden* v. *Hughes*, 321 U. S. 1; *Yick Wo* v. *Hopkins*, 118 U. S. 356), but in order to invoke this principle it must appear that there is "an element of intentional or purposeful discrimination" by the enforcement authorities (*Snowden* v. *Hughes, supra*, at p. 8). Here there is no allegation in the petition to that effect, and, indeed, even in appellants' brief and in the briefs *amici* supporting their position, "The offer of proof was not an offer to show a pattern of discrimination consciously practiced * * * " (*People* v. *Friedman, supra*, at p. 81). Under the circumstances, whether the released time program is constitutional is solely a question of law, and the case has been so treated by Special Term as well as by the Appellate Division majority and dissenters.

The order of the Appellate Division should be affirmed, with costs.

LOUGHRAN, Ch. J.: (concurring)

I vote to affirm the order appealed from upon the authority of *People ex rel. Lewis* v. *Graves* (245 N. Y. 195).

DESMOND, *J.*: (concurring)

This is a mandamus proceeding (Art. 78, C.P.A.) brought to compel the New York City Board of Education and the State Commissioner of Education, to discontinue and abolish the so-called "released time program" in the City's public schools, on the alleged ground that the release of children from those schools, for one hour a week, at the

request of parents, to attend outside religious instruction in their several faiths, violates the Federal Constitution as to its First Amendment, made applicable to the states by the Fourteenth Amendment. Specifically, it is the contention of petitioners that the program as conducted in New York City, and the state statute and state and local regulations under which it operates, "are violative of the U. S. Constitution within the principles set forth in the McCollum decision" that is, *McCollum* v. *Board of Education*, 333 U. S. 203. I vote for affirmance, because I see no basis for any claim of unconstitutionality.

The First Amendment, which is not quoted at any place in the petition or in the briefs of petitioners and their supporters, forbids the making of laws "respecting an establishment of religion or prohibiting the free exercise thereof". Neither of those prohibitions, in language or meaning, has anything whatever to do with this released time system. The *McCollum* case, *supra*, is not controlling on us here, since the Champaign, Illinois plan, there struck down as unconstitutional, differed from the New York program in a number of important respects, principally in that religious training took place in the classrooms of the Champaign public schools (one of the "chief reasons" for the decision, says Justice Jackson in a note in the Kunz dissent, 340 U. S. at page 311), some public funds were spent in Champaign, the religious teachers there were chosen with the approval of the public school officials, and pupils were, in the Champaign school buildings, solicited for religious instruction. If we are to decide this case on precedent, we must follow our own decision in *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, where we upheld, as against claims that it contravened both the Federal and State constitutions, a released time plan identical with the one now before this court. It must be conceded, of course, that there are, scattered through the several lengthy opinions in *McCollum*, expressions which can be read to proscribe all released time programs, including this one. But stare decisis does not mean stare verbis, and until the New York plan, or one just like it, confronts the Supreme Court, there will be no precedent binding on us.

Before turning to a somewhat more thorough discussion of the constitutional question, I mention another separate ground for affirmance. Petitioners are, according to the petition, the mothers of pupils in New York City schools where this plan operates. Their children do not take part in the program but each receives religious instructions at religious schools, outside public school hours. It is indeed difficult to see how the release of other parents' children impinges in any way at all, on any "right" of petitioners. True, they allege that the operation of the released time program "inevitably results" in coercion on parents and children to attend religious instruction, but it is clear that no such "inevitable" result has befallen petitioners or their children. The *Lewis* case in this court (supra) can, I suppose, be read as holding that these petitioners, as citizens, have standing to bring this mandamus proceeding, but I suggest the point will bear reinvestigation. It is far-fetched to say that petitioners are aggrieved by the continuance of a program which has no effect on them or their children, and which does not involve the use of public buildings, property or funds.

I return to the alleged constitutional question, which needs must be one under the Federal Bill of Rights, since an extra-mural religious education project, just like this one, was expressly held, in the *Lewis* case, *supra*, not to be interdicted by our State Constitution (Art. II, § 4). Our duty then (unhampered by *McCollum* which is not controlling) is to lay the plain facts of this released time system over against the plain words of the First Amendment. The Amendment, lavishly alluded to but seldom quoted, bans, in lucid, specific words, the making of any law "respecting an establishment of religion, or prohibiting the free exercise thereof". The New York released time set-up is authorized by a statute (§ 3210, Education Law) which permits absences from public schools "for religious observance and education", under rules to be established by the State Commissioner. In approving its passage in 1940, Governor Lehman, whose devotion to constitutional liberties needs no encomium, characterized as groundless the fears expressed by some that it "violates principles of our Gov-

ernment'' and stated: "The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system". The regulations adopted by the State Education Commissioner, and by respondent New York City Board (taking both sets of regulations together) excuse the absence from school for one hour a week at the close of a daily session of any pupil, whose absence is requested by his parent or guardian for attendance at, and who does attend, a religious education course conducted under the control of one or more duly constituted religious bodies, each such pupil to be registered for the religious course with, and his attendance thereat reported to, the public school authorities, no announcement of any kind relative to the program to be made in the public school, but notification to come to parents from the religious organization only, no comment to be made by any principal or teacher of attendance or non-attendance of any pupil at the religion classes, and no responsibility for attendance thereat to be assumed by the public school but solely by the religious organizations, which, cooperating with parents, must file with the public school principal weekly, a statement of attendance at, or absence from the religion classes, of any pupil enrolled in the latter, with a statement of reasons for absences therefrom. Just where in all that is there ''an establishment of religion'' or a prohibition of ''the free exercise thereof''? Characterization of such a program as ''divisive'' or ''oppressive'' or ''coercive'' is meaningless on a question of constitutional law. What petitioners are saying is that they dislike the whole enterprise, and consider it socially undesirable. Those are predilections, not questions of law.

The basic fundamental here at hazard is not, it should be made clear, any so-called (but non-existent, as I shall try to show) ''principle'' of complete separation of religion from government. Such a total separation has never existed in America, and none was ever planned or considered by the Founders. The true and real principle that calls for assertion here is that of the right of parents to control the education of their children, so long as they provide them with the state-mandated minimum of secular

learning, and the right of parents to raise and instruct their children in any religion chosen by the parents (*Pierce* v. *Society of Sisters*, 268 U.S. 510; *Meyer* v. *Nebraska*, 262 U.S. 390; *Packer* v. *University*, 298 N.Y. 184, 192). Those are true and absolute rights under natural law, antedating, and superior to, any human constitution or statute.

I cannot believe that the Chief Justice of the United States, in his opinion for the Supreme Court majority in *Dennis* v. *U. S.* —— U.S. ——, June 4, 1951, meant, literally, what he wrote: "that there are no absolutes" and that "all concepts are relative". Of course, even the constitutional rights of freedom of speech and freedom of religion are, to a degree, non-absolute, since their disorderly or dangerous exercise may be forbidden by law. But embodied within "freedom of religion" is a right which is absolute and not subject to any governmental interference whatever. Absolute, I insist, is the right to practice one's religion without hindrance, and that necessarily comprehends the right to teach that religion, or have it taught, to one's children. That anything in the United States Constitution means, or could ever be tortured into meaning, that our basic law is violated by an arrangement whereby parents take their own children from the common schools, for one hour a week for instruction in their religion, is beyond my comprehension. As Dean Pound has lately reminded us, our American bills of right "in their significant provisions are bills of liberties" (New Paths of the Law, page 7). The New York released time system is a mere method for the exercise of the religious liberties of the parents of public school pupils, and infringes on no rights of anyone, since no one else's rights are in any way affected.

By what process, then, in the teeth of those fundamentals, is an argument contrived for the proposition that this release of children from secular schools for religious education amounts to "an establishment of religion" or "prohibits the free exercise thereof"? The answer is: the argument construes the First Amendment by ignoring its language, its history and its obvious meaning, and by substituting, for its plain wording, and intendment, the

metaphor (Frankfurter, J. in the *McCollum* case, 333 U.S. at page 231) or loose colloquialism of "a wall between Church and state". That the "wall" has never been more than a figure of speech, is clear from the context in which it was first used by Jefferson (see as quoted by Justice Reed in the dissent in *McCollum* v. *Board*, note at page 245 of 333 U.S.). Quite recently, the Supreme Court itself, in two of its careful opinions in the *Dennis* case, *supra*, has warned us against encasing truth in a "semantic straitjacket" (Chief Justice's opinion) or attempting to decide great constitutional issues by the use of a "sonorous formula" (concurring opinion of Justice Frankfurter). To dispose of this "unbreachable wall" or "impassable gulf" idea, we need only apply here the simple, lucid test proposed by Justice Frankfurter in that same Dennis opinion: "not what words did Madison and Franklin use, but what was in their minds which they conveyed?" What was in the minds of the Founders is writ as large and plain as anything on history's pages, and there is not the slightest possible warrant for ascribing to them an intent to interfere (in the guise of a "Bill of Rights"!), with parents' religious indoctrination of their own children.

One of the curiosities of history is the enlarged and distorted meaning currently being given, by some, to the simple phrase of the First Amendment: "an establishment of religion". It must be the rule as to constitutions, just as to statutes, that there is "no occasion for construction" when the phrasing "is entirely free from ambiguity" (*Wright* v. *United States*, 302 U.S. 583, 589; Cooley's Const. Limitations, 8th Ed., Vol. 1, pages 124-126; *Matter of Carey* v. *Morton*, 277 N.Y. 3661, 366). The language of a constitution is to be given its ordinary meaning (*Wright* v. *U. S.*, and *Matter of Carey, supra*). The fundamental purpose in construing it is to ascertain and give effect to the intent of the framers and of the people who adopted it, keeping in mind the objects sought to be accomplished and the evils sought to be prevented or remedied. Under any or all those rules and tests (and they are all one), what is the meaning of "an establishment of religion"?

The Supreme Court itself gave us the answer in *Cantwell v. Connecticut*, 310 U. S. 296, 303: "it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship". "Established" churches were well known to the colonists, who had experienced them in Europe and America. They knew that the phrase meant: "* * * a State church such as for instance existed in Massachusetts for more than forty years after the adoption of the Constitution" (Corwin, Constitution and What it Means Today, 9th Ed., page 155). When the Constitution was adopted there were still established churches in five of the states, and a few years earlier there had been nine of them in the thirteen colonies (Walsh, Religion and Education under the Constitution, page 97). "Establishment" of a church or religion always and necessarily means an act of government favoring one particular church or group of churches. Historically, that is exactly what the Amendment meant to the framers of the Constitution and to the Congress and the People who adopted it. Despite all the "historical" gloss, there is one only exposition in the Annals of Congress of the meaning, and no contemporary proofs to the contrary. Madison, the author, said during the First Congress that the Amendment mandated (Annals of Congress for August 15, 1788): "that Congress should not establish a religion and enforce the legal observance of it by law, nor compel men to worship God in any manner contrary to their conscience". The necessity for the Amendment, he went on to say, was a fear by some that Congress might otherwise have power to "make laws of such a nature as might infringe the rights of conscience, and establish a national religion" and he repeated that the amendment was intended "to prevent these effects". Finally, he noted that the Amendment was being added because "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would require others to conform". Such fears had indeed been expressed during the campaign to ratify the Constitution as originally drawn (see Van Doren, The Great Rehearsal, pages 217 and 237). No one at that time, or for years thereafter, so far as I can discover, ever attributed to the First Amendment any broader

meaning. It is inconceivable that it was ever meant to prohibit governmental encouragement of, or cooperation with, religions generally. As Judge Story pointed out in his Commentaries (5th Ed. Vol. II, page 630) the "general, if not the universal sentiment in America was that Christianity ought to receive encouragement".

I realize that much broader scope may seem to have been accorded to the First Amendment, by the Supreme Court, in the Everson (330 U.S. 1) and McCollum decisions. But if such a broadening was intended in McCollum and Everson, it has, I say with respect, no basis in the only history which is pertinent: the history of the drafting and adoption of the Amendment itself. Indeed, that seems to have been conceded by the Justices who were in the majority in the *McCollum* case (see Justice Frankfurter, concurring, at pages 217-220 of 333 U.S.). So experienced and proficient a modern commentator as Charles P. Curtis. says, while approving the McCollum holding, that the Court reached its decision without "any justification whatever in what the Constitution says, and even less in what those who wrote it intended it to mean" (Curtis, Modern Supreme Court, Vanderbilt Law Review, Vol. 4, No. 3, page 438). Indeed, Curtis surmises "that the First Congress would have phrased the First Amendment to exclude the release of school time for religious teaching, if it had then been one of the issues of the day". The surmise is not a particularly daring one, as to those early Americans, nearly all of whose schools were religious in spirit and foundation, and who then, or just before or after, invoked the Deity in their Declaration of Independence, established chaplaincies, expressed their trust in God on their coins, and adopted a national anthem part of which is a prayer to God to "protect us by Thy might". The spirit of those times was that of Washington telling us in his Farewell Address that national morality cannot "prevail in exclusion of religious principle" and Edmund Burke, across the sea, warning that "religion is the basis of civil society, and the source of all good and comfort". Mr. Curtis says that Everson and McCollum represent judicial work "wise and well done" but his reason for that personal judgment is that he thinks that "such a use of release

time would have a bad effect on our public schools" inculcating a feeling of separatism, etc. Perhaps so, but what has all that to do with the Constitution, and is it anything more than a disguised plea that the Court be allowed to rewrite or amend the Constitution, to accomplish what seems, at the moment and to the incumbents, the better social policy?

Learned writers on law justify this sort of constitutional exegesis, and urge that "a written constitution, which is frequently thought to give rigidity to a system, must provide flexibility if judicial supremacy is to be permitted" (Levi, An Introduction to Legal Reasoning, page 42). Rejected by them is the suggestion that "the interpretation ought to remain fixed in order to permit the people through legislative machinery, such as the constitutional convention, or the amending process, to make a change" (Levi, id.). The answer, says the same author, is that "a written constitution must be enormously ambiguous in its general provisions." General and sweeping, yes. But not ambiguous. Being a constitution, it should state basic law in broadest outline, available for specific applications as needed. But it cannot, I suggest, be ambiguous and be at the same time a constitution. And, regardless of all this, a particular constitution may use definite, one-shot, one-meaning words, and when such are found, as we find them here in the First Amendment, no process of legal reasoning can make them mean something else, or serve some new and unintended purpose.

Petitioners, lacking support in precedent or history, fall back on assertions that this released time method gives religion "active cooperation" and "aid in obtaining pupils" for the off-campus religious classes. If proof of such cooperation, aid and encouragement could lead to a conclusion of law that the scheme is unconstitutional, then a trial of those allegations would be in order, and the dismissal of the petition below, without a trial, would be wrong. But governmental aid to, and encouragement of, religions generally, as distinguished from establishment or support of separate sects, has never been considered offensive to the American constitutional system. If they are inimical to

our fundamental law, then every President has offended by invoking the Deity in his oath of office, by issuing Thanksgiving proclamations and calling on our people to pray for victory in war, or for peace, or for our soldiers' safety. If petitioners are right, then there is a violation every time a chaplain opens a Congressional session with prayer, or an army bugler sounds "Church call." If petitioners are right, then the Pilgrims were wrong, as was every President who officially urged our people to train themselves in, and practice, religion. Our own State Constitution, on petitioners' theory, offends against American constitutionalism at the point in its preamble where it expresses gratitude "to Almighty God" for our freedom. Petitioners would have this court now deny the declarations of the Supreme Court in the *Holy Trinity Church* cases (143 U. S. 457) and of Chancellor Kent in the *Ruggles* case (8 Johns. 290) in 1811, that ours is a religious nation. I stand on Chancellor Kent's declaration, long ago in the *Ruggles* case, that the Constitution "never meant to withdraw religion in general, and with it the best sanctions of moral and social obligations, from all consideration and notice of the law."

The order should be affirmed, with costs.

FULD, J. (dissenting):

On federal constitutional questions, the Supreme Court of the United States is, of course, the final arbiter, and, concerning the impact of the First Amendment upon religious instruction and the public school, it has recently spoken. That Amendment, the Supreme Court declared, "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. * * * the First Amendment has erected a wall between Church and State which must be kept high and impregnable." (*McCollum* v. *Board of Education*, 333 U. S. 203, 212.) And, because of that principle, the court ruled, the Amendment prevents the passage of any laws "which aid one religion, aid all religions, or prefer one religion over another."

(*McCollum* v. *Board of Education, supra*, 333 U. S. 203, 210; *Everson* v. *Board of Education*, 330 U. S. 1, 15.)

Drawing authority and direction from section 3210, subdivision 1-b, of the Education Law, as amended in 1940, and rules and regulations promulgated by the New York State Commissioner of Education, the New York City Board of Education has made accommodation for a plan of religious instruction by individual sects for the training of public school students. The instruction is given on public school time but not on public school property. The rules direct that, upon the written request to the school by a parent and a "duly constituted religious body prepared to initiate a program for religious instruction," a child is to be released from his regular classes for such instruction for one hour a week; the public schools are required to maintain records of attendance at these religious courses and of the reasons for absence therefrom. Those children whose parents do not wish them to attend or whose religious sect has not set up a program of instruction in cooperation with the public school's regimen are kept in school to receive what the Superintendent of Schools of the City of New York refers to as "significant education work."

Petitioners challenge that program as a breach of that wall of separation which the First Amendment erected. Their standing is not questioned by respondents and many of the allegations of their petition are not disputed. Petitioners are United States citizens, residents, taxpayers and property owners in Kings County and parents of children attending public schools in the Borough of Brooklyn, New York City, where the "released time" program is in operation. Their children do not utilize it, but they do receive regular religious instruction outside of public school hours at religious schools of their respective faiths—Zorach's child at a Protestant Episcopal religious school and Gluck's children at a Jewish religious school. Asserting that other children attending the public schools are released regularly from attendance for one hour each week on condition that they attend classes for sectarian religious instruction at religious centers, petitioners seek an order directing the

State Commissioner of Education and the Board to discontinue the program and rescind their regulations.

Denied, but deemed admitted for the purposes of this motion to dismiss the petition (see, e. g., *Matter of Hines* v. *State Board of Parole*, 293 N. Y. 254, 258; *Matter of Schwab* v. *McElligott*, 282 N. Y. 182, 185-186), are the further allegations of the petition that the Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics "cooperates closely with the public school authorities" in managing the program and in "promoting religious instruction"; that "the system necessarily entails use of the public school machinery and time of public school principals, teachers and administrative staff"; that "the compulsory education system * * * assists and is integrated with the program of sectarian religious instruction carried on by separate religious sects" and that pupils are released in part from their legal duty to attend school for secular instruction "upon the condition that they attend the religious classes"; that it "has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction"; that it "has resulted and inevitably will result in divisiveness because of difference in religious beliefs and disbeliefs"; and that "limiting" participation in the "program to 'duly constituted religious bodies' effects an unlawful censorship of religion and preference in favor of certain religious sects."

In its present posture, the case before us poses the simple question whether the program just described is infected with the same constitutional informity that the United States Supreme Court found in *McCollum*. And, though it is ultimately upon the meaning of the First Amendment that the answer to that question depends, we are no longer free, since the *McCollum* decision to place our own meaning or gloss upon that Amendment, but must read it as has the Supreme Court.

While the Champaign "released time" system which was condemned in that case differed in details from that complained of herein, the court's conclusion and the principles

which it enunciated are broad in scope and clearly reach far beyond the precise fact situation there presented.

Regarding the conclusion, there may be room for argument as to which phrase, torn from context, best reflects the sense to be distilled from the several opinions written, but, respecting the net result, there can be no doubt whatsoever. Mr. Justice Reed, dissenting alone, recorded the common ground and ultimate conclusion of his brethren's opinions with the statement (333 U. S., at p. 240):

> "From the tenor of the opinions I conclude * * * that any use of a pupil's time, *whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance*, falls under the ban." (Emphasis supplied.)

Regarding the principles enunciated, the first tenet is that there be a wall "high and impregnable" between Church and State and that the State maintain a strict neutrality, neither suppressing nor sustaining religion. Speaking for a majority of six judges, Mr. Justice Black wrote (333 U. S., at pp. 210-211):

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. * * * In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state'".

That wall was breached by adoption of the released time program in Champaign, according to the court, since by it the state effectively aided religious in two respects—(1) by making the public school buildings available and (2) by providing pupils for this or that sect's religious classes. Mr. Justice Black phrased it in this way (pp. 209-210, 212):

> "Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the

tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment. (pp. 209-210)

"Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State (p. 212)."

Not only by direct command, but also by the pressures inherent in the functioning of the program did the Champaign system effect a breach of the wall. In the words of Mr. Justice Frankfurter, concurring,

"The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. * * * That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend." (p. 227).

It is not that the First Amendment begrudges the use of forty-five or sixty minutes of the school day for religious instruction that condemns the Champaign program, but rather the utilization by state authority of the "momentum of the whole school atmosphere and school planning" behind released time:

"If it were merely a question of enabling a child to obtain religious instruction with a receptive mind, the thirty or forty-five minutes could readily be found on Saturday or Sunday. If that were all, Champaign

> might have drawn upon the French system, known in its American manifestation as 'dismissed time,' whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school. The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning. To speak of 'released time' as being only half or three quarters of an hour is to draw a thread from a fabric'' (pp. 230-231).

The pleadings in the record before us make plain the use of the public school machinery, its atmosphere and its momentum. The vice in the use of the state's compulsory public school machinery to provide pupils for the religious classes is as predominant a factor in the present case as it was in *McCollum*. (333 U. S., at p. 212.) There is no denying that the program enables religious denominations to divert to sectarian instruction pupils assembled, and time set aside, for secular education by the state's compulsory attendance laws. Moreover, while it is true that the regulations prohibit comment on a pupil's failure to attend the religious classes, the program itself seems bound to exert certain inherent pressures on the pupils to attend. For one thing, the natural tendency of pupils to conform to the practices of fellow students cannot be discounted (333 U. S., at p. 227). In addition, the release from the obligation to attend class for the one hour a week is unquestionably an inducement to register for such courses, on condition that pupils attend the religious classes for, it has been observed, religious instruction can compete more successfully with arithmetic than with recreation.

The cooperation of the public school system further serves to assure the attendance at the religious classes of the pupils released for that purpose. Thus, the regulations require that "Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week," together with a statement of the reason for any absence. The knowledge that an official record is kept

of his attendance necessarily places pressure on the child—accustomed as he is to the discipline of school—to attend these religious classes. The vitality of the system lies in the prestige, planning, cooperation and assistance lent by the public school system, which is exactly that fusion and integration of state and religion prohibited by the First Amendment as read by the Supreme Court. Thus, even if we assume that no public school funds and that but little of the time of public school employees are devoted to the program, it violates the Constitution.

And, as was true of the Champaign system, so here, the program is necessarily divisive in its effect. As Justice Frankfurter forcefully noted in his opinion in *McCollum*:

> "Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages (pp. 227-228).
>
> "Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by

religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice (pp. 216-217)."

Present a program where some children are released from their usual attendance at public school on condition that they attend courses in religious observance and education under the control of duly constituted religious bodies, it cannot matter, insofar as the impact of the First Amendment is concerned, that such religious instruction is given off the school grounds. What is vital and operative is, not where the religious teaching is given, but that it is given at all through the instrumentality of the state or through the machinery or momentum of the public school system. No one disputes the power of the legislature to shorten the school day so as to afford greater opportunity for week-day religious instruction but that grant, that opportunity, must not be mingled with such coercion to attend as is derived from employment of the compulsory attendance laws and the public school.

In sum, then, what the First Amendment forbids is the fusing, through state action, of the secular and the sectarian in the field of public education. The circumstance that any sect may participate in the program is immaterial. It is not discrimination alone that the Constitution prohibits; as the Supreme Court made exceedingly clear, neither the state nor its public schools may be used to "'aid one religion, aid all religions, or prefer one religion over another.'" (*McCollum* v. *Board of Education, supra*, 333 U. S. 203, 210-211.)

I perceive no merit in the contention for which *Pierce* v. *Society of Sisters*, 268 U. S. 510, is cited—that a challenge to the released time program is a challenge to the right of parents to control the rearing and education of their children. More specifically, it is urged that, if a parent may insist upon the "release" of a child from any attendance at a public school so as to permit him to attend a parochial school, the parent has, *a fortiori*, a right to

insist on the release of the child for but a small percentage of school time.

The argument goes too far. If valid, it would lead to the conclusion that, even though the child attends a public school, the parent would have a constitutional right to remove him therefrom at any time and for any period in order to have him instructed in sectarian religious courses. If that were so, then the released time program would be unconstitutional for a reason wholly different from that asserted: it would impinge on a parent's "constitutional right", by limiting the religious instruction to an hour and by requiring attendance at the public school for the balance of the day. The *Pierce* case stands for no such proposition. The Supreme Court there held only that the state could not constitutionally prevent parents from determining for themselves where their children shall be educated and whether that education shall be sectarian or non-sectarian. No one questions the right of parents to send their children to private or parochial schools of their own choosing. What the *McCollum* case concerned itself with, and what is here involved, is not the right of a parent, but rather the power of the state. The *McCollum* case, as we have noted, invokes the doctrine of separation, not against the parent's right, but against the state's power, and holds that the state may not commingle a program of religious instruction with the secular education given in its public schools. Nothing in the *Pierce* case either negates that doctrine or suggests a contrary conclusion.

It may well be that there are children growing up untutored in matters religious and, if that be so, it is a matter for grave concern. Considerations of fundamental principle, however, are involved when an attempt is made to cure that lack through the instrumentality of the public school. Our constitutional policy, it has been said,

> "does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular

intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the (First) Amendment itself.

"It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education, that the Constitution forbids it to do so." (Rutledge, J., dissenting in *Everson* v. *Board of Education, supra*, 330 U. S., at p. 52.)

Nor may the released time program be justified as merely another application of the immemorial and unchallenged practice of releasing children from school attendance to permit them to observe their religious Holy Days. To treat them as similar is to confuse two entirely different and distinct matters. Religious observance of Holy Days necessarily requires attendance at church or temple at stated times which may coincide with the hours otherwise specified by law for school attendance. To refuse to excuse children for such religious observance would be a restraint of that freedom of religion, and interference with that liberty of worship, which the Constitution guarantees. (*Cf. Board of Education* v. *Barnette*, 319 U. S. 624, 637, 642, 646.) Obviously, no such issue is here involved.

People ex rel. Lewis v. *Graves*, 245 N. Y. 195, upon which respondents heavily rely, did involve a scheme for released time for religious instruction somewhat similar to the one before us: on the written request of the parent alone—and not, as in this case, by a clergyman as well—the child was released for a half hour a week of what would normally have been a study session at school. However, in view of the Supreme Court's interpretation in the *McCollum* case of the controlling First Amendment—quite apart from other Supreme Court decisions definitively establishing that that Amendment applies to the states (see *Everson* v. *Board of Education, supra*, 330 U. S. 1; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Hamilton* v. *Regents*, 293 U. S. 245,

265).—the *Lewis* case can no longer be deemed decisive, and no useful purpose is served by considering whether an appraisal of the factual differences between the New York City program and the White Plains program in the *Lewis* case would make the Lewis decision inapplicable even under the State Constitution.

Time has taught, and the Supreme Court, by its decision in McCollum has reaffirmed, the wisdom and necessity of maintaining "a wall * * * high and impregnable" between Church and state, between public school secular education and religious observance and teaching. Maintenance of that barrier was believed by the Supreme Court, as earlier it had been by the Founding Fathers, not as a demonstration of hostility to religion, but rather as a means of assuring complete freedom of religious worship. Whether the released time program in New York City breaches that barrier is the only issue before us. I believe that it does.

It is impossible to justify the determination made below that the petition be dismissed for insufficiency. At the very least, there should be a trial to permit development of such allegations as those that assert the "close cooperation" between public school authorities and those conducting the classes in religious instruction; the use of public school machinery and the time of public school personnel "necessarily entailed" by the program; the "exercise of pressure and coercion" upon parents and children to secure attendance of children at such classes; the divisive nature of the program; "certain religious sects." However, as I have already indicated, I believe that, on the basis of statute, regulations and the admitted allegations of the petition, petitioners are entitled to a decision, on the pleadings, that the released time program under consideration falls within the ban of the Federal Constitution.

Accordingly, I would reverse and direct entry of a final order granting the relief sought in the petition.

* * * * * * *

Order affirmed with costs

Opinion by Froessel, J., in which Lewis, Conway and Dye, JJ., concur.

Loughran, Ch. J., concurs for affirmance upon the authority of *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195.

Desmond, J., concurs for affirmance in separate opinion.

Fuld, J., dissents in opinion.

EXHIBIT "B"

Opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department

(278 App. Div. 573; 103 N. Y. S. 2nd 27; Jan. 15, 1951)

Matter of Zorach and ano., pet-ap (Clauson, Jr., &c., res)—In a proceeding pursuant to article 78 of the Civil Practice Act, petitioners appeal from a final order dated June 23, 1950, which (1) denied petitioners' motion for an order directing a trial in respect to issues of fact; (2) granted the motion of the intervenor-respondent for a final order dismissing the proceedings on the merits on the ground that the petition failed to state facts sufficient to constitute a cause of action; (3) sustained the objections of respondents in point of law to the petition; and (4) denied petitioners' application in all respects and dismissed their petition on the merits as a matter of law. The purpose of the proceeding was to obtain an order, directed to respondent Board of Education and respondent Commissioner of Education, to discontinue the program of released time for religious education in practice in New York City and to rescind the regulations promulgated by both respondents respecting and authorizing such released time program.

Section 3210, subdivision 1-b, of the Education Law provides that absence from attendance upon instruction, as required by that statute, shall be permitted for religious observance and education, under rules that the Commissioner of Education shall establish. Pursuant to such statutory authority, respondent Spaulding, as Commissioner of Education, established the following regulations: "1. Absence of a pupil from school during hours for religious observance and education to be had outside the

school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil. 2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religions bodies. 3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities. 4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week. 5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities. 6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Thereafter, respondent Board of Education, purporting to act in accordance with the regulations adopted by the Commissioner of Education, established the following regulations: "1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program. 2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose. 3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor. 4. Upon the presentation of a proper request as above prescribed pupils of any grade will be dismissed from school

for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough. 5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals. 6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Petitioners contended, for reasons set forth in their petition, that the regulations so established and the operation thereunder of the "released time program" in New York City, pursuant thereto, prohibited the free exercise of religion in violation of the First and Fourteenth Amendments of the United States Constitution, and section 3, article 1 of the Constitution of the State of New York, and that section 3210 of the Education Law, if construed to authorize the establishment of such regulations and the operation of the released time program thereunder as described in their petition, was also unconstitutional as violative of the First and Fourteenth Amendments of the United States Constitution.

Order affirmed, with one bill of $10 costs and disbursements to respondents and intervenor-respondent.

Subdivision 1-b of section 3210 of the Education Law, which merely provides that absence from attendance on required instruction shall be permitted for the specified religious purposes under rules to be established, is in no way unconstitutional. Moreover, if the truth of all of the well pleaded allegations of the petition is conceded, petitioners have failed to allege facts sufficient to establish any invasion of their constitutional rights by the adoption of the regulations complained of, or the operation thereunder of the "released time program" (cf. People ex rel. *Lewis* v. *Graves*, 245 N. Y., 195; Matter of *Lewis* v. *Spaulding*, 193 Misc., 66). *McCollum* v. *Board of Education* (333 U. S. 203), which may be readily distinguished on its facts does not require a contrary determination.

Nolan, P. J., Carswell and Sneed, JJ., concur.

Adel, J., dissents and votes to reverse the order and to

grant the motion of petitioners for the relief demanded in the petition, with the following memorandum: The program described in the regulations adopted under section 3210, subdivision 1-b, of the Education Law, and which admittedly is in operation in New York City, is in violation of the constitutional requirement for separation of church and state (*McCollum* v. *Board of Education*, 333 U. S., 203).

The elements of the program operated in Champaign, Ill., are factually different from those in the New York City program, in suit, but the difference in facts requires no different holding. The New York City program is void in that it is integrated with the state's compulsory education system, which assists the program of religious instruction carried on by separate religious sects; in that it releases pupils, who are compelled to attend public schools for secular education, from part of their legal duty upon condition that they attend religious classes; and in that the state's compulsory public school machinery is used to afford aid and assistance to sectarian groups by helping provide pupils for religious classes. Wenzel, J., concurs with Adel, J.

EXHIBIT "C"

Opinion of Special Term, Supreme Court of the State of New York, Kings County

(198 Misc. 631; 99 N. Y. S. (2d) 339; June 19, 1950)

By Mr. Justice DiGiovanna:

Matter of Zorach et al. (Clauson, Jr., et al.)—This is an application pursuant to article 78 of the Civil Practice Act for the following relief: 1. Directing a trial in respect of issues of fact raised by the pleadings and accompanying papers; 2. The hearing of any objections in point of law in relation to the pleadings; 3. Argument upon the merits of petitioners' application, and 4. Such other and further relief as may be just and proper.

The petitioners allege that they are citizens, taxpayers and parents of children attending public elementary schools in the Borough of Brooklyn, City of New York. The re-

spondents are the Board of Education of the City of New York, the Commissioner of Education of the State of New York, and The Greater New York Co-ordinating Committee on Released Time of Jews, Protestants and Roman Catholics, as intervenor respondent.

The objective sought by this proceeding is to review the determination of the Board of Education of the City of New York and the State Commissioner of Education in establishing what is commonly known as the "released time program" of religious instruction now in practice in the public schools of this city and elsewhere throughout this state with the ultimate aim of compelling the discontinuance of this program. Varying practices having developed in "released time programs," in order to insure uniformity and legality, the Legislature of the State of New York enacted chapter 305 of the Laws of 1940, amending Education Law 625 (now Education Law, sec. 3210) by adding thereto the following sentence: "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

It is enlightening to quote, at this point the memorandum handed down by Governor Lehman when he signed this bill, which reads as follows: "Under this bill the State Commissioner of Education shall establish rules under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education. For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws. In so holding the Court of Appeals pointed out: 'Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agent of the State authorized or charged with the responsibility of adopting rules under which absences for

religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules. A few people have given voice to fears that the bill violates principles of our Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."

To effectuate this legislation, the State Commissioner of Education on July 4, 1940, issued the following regulations which, as amended, are "1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil. 2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies. 3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities. 4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week. 5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities. 6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Thereafter, on November 13, 1940, the Board of Education of the City of New York promulgated the following rules and regulations which are presently in full force and effect: "1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program. 2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil

a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose. Religious organizations, in co-operation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor. 4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough. 5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals. 6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Since the release of any child for one hour a week for religious instruction is at the option of the parents of the child, the parent who desires to have his or her child so released is required to fill out a card, the form of which is as follows:

"Registration For Released Time Religious Instruction.
New York City. 194 . To
Principal of (School). Please excuse
my child, of grade
one hour weekly on throughout the rest
of this school year, beginning to go for
religious instruction at
(Name of Center to which child is to go). (a)
(Signature of parent or guardian). Address
Phone (b) Provision has been made to accommodate and instruct this pupil.
(Signature of Clergyman). (Card to be retained and filed by the Public School). RS-1."

Such registration cards are prepared and distributed either by the intervenor-respondent, an organization wholly independent of the school system, or by a particular religious organization. No member or employee of either of the other respondents participates in any way in the distribution of the cards, the distribution taking place entirely outside of school premises. No expense of this program is borne directly or indirectly by either of the other respondents. When the card has been filed in the school by the parent and the principal has notified the teacher that the pupil shall be released at 2 P.M. on the designated day for religious instruction then, without further announcement by the teacher, the child may leave the class and school grounds at the designated time and proceed immediately to the location specified on the card for religious instruction.

Education is a process for the mental, physical and moral development of human beings. Throughout history, man has sought some form of religious worship as an influence toward his moral development. The fundamental idea of a Supreme Being requiring worship has become inbred in the mind of man. The idea of worship in varying forms has prevailed in the minds and hearts of man throughout the ages. Formal religions too numerous and antithetical to be reconcilable, have arisen and flourished; their followers even became mortal enemies because of discord created by diversity of religious beliefs.

When the founding fathers of this country set about their task of adopting an organic law for this new nation, they did not deny the value of religion, but wisely determined that all creeds could live together more harmoniously if no creed was given preference. Therefore, in this country there has been developed a formal separation of church and state, which does not deny the value of any formal religion, but is per se, a guarantee of freedom of worship.

Recognition of the value of religious instruction as an educational contribution to the moral development of man began to take definite shape in this jurisdiction about a quarter of a century ago and has developed into the "released time program." "What more logical advance could be made in the science of sociology than the unification of

religious leaders in a coordinated effort to teach children faith and morality—and for that purpose to excuse them from schools for one hour a week to go to the church or tabernacle or synagogue of their parents' choice?'' (*Gordon v. Board of Education*, 78 Cal., App. Reports [2d Series], 464, 474).

The petitioners labor under the same misconception as did the petitioners in the case quoted immediately above and their concepts were criticized and rejected in the following language: "Throughout her entire argument, appellant misconceives the American principle of religious freedom. What she contends for is freedom *from* religion rather than freedom *of* religion. Appellants' argument leads one to the conclusion that the doctrine of separation of church and state looks upon religion as something intrinsically evil, and against which there should be a rigid quarantine. Nothing is farther from the true concept of the American philosophy of government than such an argument. In the constitution of every state of the union is to be found language which either directly, or by clear implication, recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the wellbeing of the community'' (*Gordon v. Board of Education of the City of Los Angeles, supra*, p. 476). The lines immediately following cite the preamble to the Constitution of the State of California which is almost exactly the wording of the preamble to the Constitution of the State of New York, which latter reads as follows: "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, Do Establish This Constitution.''

It is in recognition of this principle that separation of church and state has never meant freedom *from* religion but rather freedom *of* religion.

To permit restraint upon state and local educational agencies which are lawfully authorized to grant released time to our young citizens who wish to take religious instruction would constitute a suppression of this right "of" religious freedom. It is tantamount to a denial of a basic right guaranteed by the letter and the spirit of our Ameri-

can concept of government. It would be a step in the direction of and be consonant with totalitarian and communistic philosophies existing in jurisdictions wherein atheism and the suppression of all religions are preferred to the freedom of the individual to seek religious instruction and worship. Such would be the result or conclusion if the relief sought herein by the petitioners was to be granted.

"Released time programs" have been the subjects of judicial review in many jurisdictions within this country for two and one-half decades. Among the first of these cases was involved the test of a plan used in White Plains, New York, which seems to have been identical with that here attacked. That plan was held constitutional in the Supreme Court at Special Term, in the Appellate Division and in the Court of Appeals without a single dissent: "Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. As a matter of educational policy, the Commissioner doubtless may make proper regulations to restrict the local authorities when the administration of the plan of week-day instruction in religion or any plan of outside instruction in lay subjects in his judgment interferes unduly with the regular work of the school." (*People ex rel. Lewis* v. *Graves*, 245 N. Y., 195, 198).

Subsequent to the decision of the Supreme Court of the United States in *McCollum* v. *Board of Education* (333 U. S. 203) another proceeding under article 78, C. P. A., was initiated in an attack upon this program (*Matter of Lewis* v. *Spalding*, 193 Misc. 66, appeal withdrawn 299 N. Y. 564). In that proceeding the relief sought was (1) to discontinue the practice of releasing children from regular school attendance, permitting them to receive religious instruction, (2) to discontinue the existing rules or regulations providing therefor and (3) restraining the adoption of such rules or regulations in the future. The demands therein sought a peremptory order, which was denied; in the instant case, there is in effect a restatement of demands calculated to raise issues of fact. The paramount legal question in the aforesaid case, namely, the constitutionality of the statute and regulations, having been determined adversely to the

petitioner therein, a similar determination must be reached herein.

The program in operation in the City and State of New York is radically dissimilar from the Champaign Plan, which the United States Supreme Court, in the *McCollum* case, declared to be unconstitutional: the differences may be illustrated best by setting in apposition distinctive features of both.

Champaign Plan	New York City Plan
1. No underlying enabling State statute.	1. Education Law § 3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish".
2. Religious training took place in the school buildings and on school property.	2. Religious training takes place outside of the school building and off school property.
3. The place for instruction was designated by school officials.	3. The place for instruction is designated by the religious organization in cooperation with the parent.
4. Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils.	4. No element of segregation is present.

Champaign Plan	New York City Plan
5. School officials supervised and approved the religious teacher.	5. No supervision or approval of religious teachers or course of instruction by school officials.
6. Pupils were solicited in school buildings for religious instruction.	6. School officials do not solicit or recruit pupils for religious instruction.
7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds.	7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved.
8. Non-attending pupils isolated or removed to another room.	8. Non-attending pupils stay in their regular classrooms continuing significant educational work.
	9. No credit given for attendance at the religious classes.
	10. No compulsion by school authorities with respect to attendance or truancy.
	11. No promotion or publicizing of the released time program by school officials.
	12. No public moneys are used.

Section 3210 of the Education Law, as implemented by the respective regulations of the state commissioner and the board of education, is objected to by the petitioners herein

as unconstitutional. In *Everson* v. *Board of Education* (330 U. S., 1, 16) we are reminded: "* * * we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power." In the same case (pp. 15-16) it is stated that: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

The recent and much-quoted decision of the Supreme Court of the United States in *McCollum* v. *Board of Education* (supra), which declared unconstitutional the so-called Champaign Plan, was arrived at on the facts of that case. In so doing, Mr. Justice Frankfurter expressly stated (p. 226): "The substantial differences among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied." And again (p. 227), the same justice said: "Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects."

In the very opinion holding the Champaign Plan unconstitutional, Mr. Justice Frankfurter further said (p. 230): "If that were all, Champaign might have drawn upon the French system, known in its American manifestation as 'dismissed time,' whereby one school day is shortened to

allow all children to go where they please, leaving those who so desire to go to a religious school."

As a further indication that the plan before this court is consistent with this judicial reasoning, the same court said (p. 231): "We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program. We find that the basic Constitutional principle of absolute Separation was violated when the State of Illinois, speaking through its Supreme Court sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement."

In discussing the objection that a child whose parents do not choose for him any form of religious instruction may be classed as a dissenter and thereby humiliated, Mr. Justice Jackson, in his concurring opinion, said in the same case (p. 233): "Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground." Coinciding with the views of Mr. Justice Frankfurter, Mr. Justice Jackson in the same case continued (p. 237): "The opinions in this case show that public educational authorities have evolved a considerable variety of practices in dealing with the religious problem. Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce

different experiments. And it must be expected that, no matter what practice prevails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error." In what amounts to a summation of the entire proposition involving voluntary religious instruction, in the same opinion, Mr. Justice Jackson said (p. 235): "To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits."

A careful analysis of the McCollum case leads this court to hold that the present "released time" program contains none of the objectionable features of the plan in that case which was the basis of the decision in the Supreme Court of the United States holding the plan to be unconstitutional. The subsequent decision of the courts in this state in *Matter of Lewis* v. *Spalding* (supra) is clearly determinative of the constitutionality of the plan under attack.

The petitioners have, in this proceeding adopted a different prayer for relief from that sought in *Matter of Lewis* v. *Spalding* (supra). While continuing to attack the constitutionality of the statute and regulations involved, they seek a direction for discontinuance of the regulations on a generalized allegation of maladministration in particular instances, of which no particulars are cited.

However, the practice or practices which may grow up in

the matter of administrative details do not affect the constitutionality of the statute involved, for the statute must stand or fall by itself on this question.

The attorney for the petitioners, in his memorandum relative to the merits of the petitioner's application and the legal sufficiency of the petition says (p. 9): "It is submitted that it is not the details of a particular released time program which render it violative of the First Amendment; it is the basic concept—the raison d'etre of the program, which causes it to run afoul of the Amendment as interpreted in the Everson and McCollum decisions." However, the majority opinions of Mr. Justice Frankfurter and Mr. Justice Jackson quoted above seem to directly negate this assertion.

In the face of a holding that the statute attacked is constitutional, we next come to the question of whether triable issues are presented. What are the issues raised by this proceeding other than the question of constitutionality? There are no degrees of constitutionality. Neither does compliance with the statute render it constitutional if it is unconstitutional, nor does administrative error render it unconstitutional if it is constitutional. It may be, conceivably, that in isolated cases a particular teacher will fail to conform to the regulatory mandates imposed by the respondents, but if such be the case, the remedy is not the invalidation of valid statute but the imposition of a disciplinary penalty upon the violator. To prevent or redress particular instances of maladministration, ample machinery of law exists. However, that is not an issue in this special proceeding because no record has been presented of an arbitrary or capricious ruling by the respondents respecting any particular act of maladministration. This court cannot agree, therefore, with the argument of counsel for the petitioners that it has before it the question of whether or not the program is being conducted in accordance with the regulations. Indeed, there is no proof that it is not while there is proof, immaterial to this special proceeding, that it is being so conducted in the particular schools attended by the children of these petitioners. In fact the attorney for the petitioners, in the citation from his brief above

quoted, concedes that fact. The question validly presented by this proceeding is solely addressed to the constitutionality of the statute and regulations.

Previous motions made and determined by other justices of this court have been in no sense determinative of the issues raised in this proceeding. Mr. Justice Beldock, and the Appellate Division (275 App. Div. 774) distinctly stated that their respective decisions determined only the proper venue. Similarly, neither Mr. Justice Walsh (195 Misc., 531, 534), nor Mr. Justice Hearn made any determination that the petition was immune from attack at this time. As a matter of fact, The Greater New York Co-ordinating Committee only became a party to this proceeding by permission of Mr. Justice Walsh and the cross-motion of the said intervenor in this proceeding must be considered timely.

From the above, it follows the the first prayer for relief of the petitioners, namely, that a trial be directed of the respective issues of fact raised by the pleadings and accompanying papers, must be denied because no issues exist. The second prayer for the hearing of objections in point of law in relation to the pleadings, has been disposed of by way of lengthy oral argument before this court and submission of voluminous briefs by all the interested parties. The third prayer, that argument be had on the merits of petitioners' application, has been disposed of in the same manner. The court finds that assuming all of the facts set forth in the petition are deemed to be true, nothing has been shown to warrant a finding that section 3210 of the Education Law is unconstitutional or that the regulations adopted by the respondents as required by section 3210, are arbitrary or capricious or unreasonable in law or in fact.

The cross-motion of the intervenor-respondent, is granted. The objections of all respondents in point of law to the petition are sustained and the petition is dismissed on the merits as a matter of law.

Submit final order.

EXHIBIT "D"

Opinion of Special Term, Supreme Court of the State of New York, Kings County, on Denial of Motion for Reargument

(New York Law Journal, August 23, 1950 at p. 299)

By Mr. Justice DiGiovanna:

This is a motion for a reargument of a motion heretofore decided by this court which sought to have declared unconstitutional the "released time" program for religious instruction now in effect in the public elementary schools of this city, and as an alternative request seeking the trial of issues allegedly raised by the petition and answering affidavits.

Reargument is sought on two grounds. The first is that the court overlooked the binding effect of the opinion of Mr. Justice Black in *People ex rel. McCollum* v. *Board of Education* (333 U. S., 203). This court, it is true, quoted excerpts from the concurring opinion of Mr. Justice Frankfurter, who was one of the majority justices, as this court might properly do, to show the reasoning of various members of the court, and specifically, to show a rational distinction between the Champaign plan there considered and the plan challenged herein. Furthermore, a court of concurrent jurisdiction in this state has spoken since the decision in the *McCollum* case upholding the constitutionality of a similar program (*Matter of Lewis* v. *Spalding*, 193 Misc., 66, appeal withdrawn 299 N. Y., 564). Furthermore, the Court of Appeals of this state earlier upheld a similar plan in *People ex rel. Lewis* v. *Graves* (245 N. Y., 195). This court must reaffirm its determination of constitutionality on the basis of the above decisions and hold to its distinction between the New York and the Champaign plans.

The second ground on which reargument is sought is that the court misinterpreted the factual theory of petitioners' proceeding. In support of this motion for reargument there have been submitted one conclusory affidavit of the attorney for the petitioners, one affidavit of a *former*

principal, four affidavits of *former* teachers, three affidavits from parents and three from former pupils. These affidavits outline what might be termed, administrative difficulties.

The moving papers on this motion have been duly considered by this court in arriving at its determination herein, even though such reargument must normally be based upon the papers submitted upon the original motion (*Hauser* v. *Herzog*, 141 App. Div., 522, 524; Matter of Hooker, 173 Misc., 515, 517).

Reargument should not be granted unless it is shown that some question decisive of the case and duly submitted by counsel has been overlooked (*Mount* v. *Mitchell*, 32 N. Y., 702; *Fosdick* v. *Hempstead*, 126 N. Y., 651; Matter of Palmer, 193 Misc., 411). Nor may it be granted upon an additional showing of facts unless such facts occurred since the making of the original motion or permission to present such additional facts has been granted (*Haskell* v. *Moran*, 117 App. Div., 251, 252; *De Lacy* v. *Kelly*, 147 App. Div., 37, 38).

Neither do the moving papers herein cite any contradictory decision of a higher court rendered subsequently to the decision of this court (*Hand* v. *Rogers*, 16 Misc., 364) nor that any controlling decision exists to which the attention of this court has not heretofore been called (*Coleman* v. *Livingston*, 45 How. Pr., 483).

The moving papers herein show no valid reason for granting leave to reargue, but seem to be rather a plea to be allowed to renew the original motion upon additional facts not newly discovered.

The motion for leave to reargue is denied.